

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF AGRICULTURE

In the Matter of the Department  
of Agriculture's Refusal to Renew  
the Retail Foodhandlers License of  
Thomas Simms, Timothy Simms,  
Theresa Simms d/b/a Sunrise  
Park Bakery

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on July 24, and August 6 and 7, 1991, at the Office of Administrative Hearings, Minneapolis, Minnesota. The final post-hearing brief was filed on September 9, 1991, at which time the record was closed.

Paul A. Strandberg, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Department of Agriculture (Department). Jerome D. Ciresi, Attorney at Law, Suite 1300, Capitol Centre Plaza, 386 North Wabasha, St. Paul, Minnesota 55102, appeared on behalf of the Respondents, Thomas Simms, Timothy Simms, and Theresa Simms d/b/a Sunrise Park Bakery.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of the Minnesota Department of Agriculture shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Elton Redalen, Commissioner, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, Minnesota 55107.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Respondents are so unfit based upon their history of operating the Sunrise Park Bakery that their retail foodhandlers license should not be renewed pursuant to Minn. Stat. 28A.07 (1990),

Based upon all of the proceedings herein, the Administrative Law Judge

makes the following:

#### FINDINGS OF FACT

1. The Sunrise Park Bakery is located at 3590 North Century Avenue in Mahtomedi, Minnesota, in Washington County. Prior to July of 1990, the bakery was owned and operated by Grover and Donna Simms, who were also the named licensees on a retail foodhandlers license issued by the Minnesota Department of Agriculture. The Simms' children, Thomas, Timothy and Theresa, were employed in the bakery at that time.

2. In 1985, Senior Food Inspector Daniel W. O'Neil assumed the primary responsibility of performing regular sanitary inspections of the Sunrise Park Bakery. Mr. O'Neil's first inspection of the bakery was on May 7, 1985, as the result of a consumer complaint concerning the "freshness" of bread that was purchased on May 6, 1985. While conducting the inspection, Mr. O'Neil found no validity to the "freshness" complaint but did issue three separate orders concerning sanitary conditions in the production (not retail) area of the bakery. A copy of the orders and an explanation of them was given to Grover Simms by Mr. O'Neil

3. On October 9, 1985, Mr. O'Neil returned to the Sunrise Park Bakery to make another inspection. At that time, he issued two sanitation orders which were to be complied with by October 23, 1985. These orders required a cleanup of the food processing tables and discontinuing the storage of items in the food processing area that were not used for production, such as newspapers, cans and empty food containers.

4. On October 24, 1985, Mr. O'Neil returned to the Sunrise Park Bakery for the purpose of a follow-up inspection concerning the orders he had issued on October 9. At that time, he found that the orders issued on October 9 had been substantially complied with but he issued two additional sanitation orders concerning the cleanliness of the deep fryer and the food product weigh table. No compliance date was included for the new orders,

5. It was Mr. O'Neil's usual practice to speak with the owner and/or licensee when he entered an establishment to conduct an inspection. After the inspection had been completed, Mr. O'Neil would go over any orders issued with the owner-licensee and a copy of the report would be left. The owner was requested to sign the report indicating that he/she had received a copy and any orders had been explained.

6. On June 19, 1986, Daniel O'Neil returned to the Sunrise Park Bakery for the purpose of conducting a sanitation inspection. At that time, he issued orders which required several pieces of equipment in the production area to be cleaned up and the removal of paper bags, newspapers, cardboard boxes and metal cans from the food production room. The orders contained in Mr. O'Neil's report were explained to Grover Simms and he was directed to comply with the orders on or before 8:00 a.m. on June 25, 1986.

7. Mr. O'Neil conducted a reinspection of the Sunrise Park Bakery on June 25, 1986, and found that the orders issued on June 19 were substantially complied with- However, additional orders were issued requiring Mr. Simms to clean up the area around the ovens, clean up around the outside of the

building, and confine the storage of "non-production" materials to an isolated area of the bakery,

8 . On I t i n e 4 , 1 987 , Dan i PI O' Nei I returned to the Sunri se Park Bakery

for the purpose of conducting a sanitation inspection. After completion of the inspection, Mr. O'Neil issued a "sanitary notice" pursuant to Minn. Stat.

31.165, requiring that 19 orders be complied with within three working days. In addition, "facility" orders were issued which required that: (1) all cardboard boxes, cardboard, papers, books, magazines and empty cans be removed from the food processing area; (2) all weeds within a 20-foot area around the building be removed; (3) equipment be removed from the front walk of the building; (4) equipment stored in the receiving-shipping dock be removed; (5) the ceiling in the large proof box be repaired; (6) the storage of bulk ingredients on the floor be discontinued; and (7) the practice of using the equipment cleaning sink for a storage area be stopped. On June 5, 1987, a certified letter was sent to Grover Simms from Thomas W. Masso, Director of the Food Inspection Division, informing Mr. Simms that prompt action must be taken to correct the conditions noted in the sanitary notice issued on June 4.

9. On June 9, 1987, a follow-up reinspection was conducted by Mr. O'Neil at the Sunrise Park Bakery. At that time, Mr. O'Neil wrote in his report that "all sanitation orders had been complied with". However, the inspector "re-wrote" two orders concerning the elimination of papers, books and empty cans from the food production area, the elimination of weeds from the outside of the building, and the removal of equipment that was not being used

10. On June 25, 1987, Mr O'Neil reinspected the Sunrise Park Bakery and issued second notices on three "facility" orders, Those were: (1) the elimination of papers, books and empty cans from the food processing area; (2) the removal of all equipment from the front walk of the building; and (3) the removal of equipment that was being stored on the receiving dock,

11. On November 7, 1988, a consumer complaint was received by the Department of Agriculture which alleged that three live beetles had been found in bakery rolls purchased at the Sunrise Park Bakery. This complaint was referred to Daniel O'Neil who conducted an inspection of the bakery on November 9, 1988. At that time, Grover Simms informed Mr. O'Neil that he had removed and destroyed all of the product which was alleged to have been contaminated. Mr. O'Neil noted on his report that an inspection of the products in question in the storage cases revealed no insect infestation. In addition, Mr. O'Neil issued a sanitary notice to Mr. Simms which contained nine orders which were to be corrected within three days. On November 10, 1988, the Director of the Food Inspection Division sent a certified letter to Grover Simms requesting that he take prompt action to correct the conditions noted in the sanitary notice issued by Daniel O'Neil within three days.

12. On November 28, 1988, Mr. O'Neil conducted a reinspection of the Sunrise Park Bakery to verify compliance with the orders i ssued on November 9 contained in a sanitary notice. Mr. O'Neil found that six of the nine sanitation orders had been complied with, with the remaining three still not completely remedied. A new sanitary notice was issued which required that Mr. Simms "take proper measure to eliminate all insects and all evidence of their

infestation from this establishment (fly, moth-like insects noted in the area between the bulk ingredients storage area and the ovens). A sample of raw

ingredient was taken by O'Neil for analysis by the Department laboratory. On November 29, 1988, a certified letter was sent to Grover Simms from the Assistant Director of the Food Inspection Division advising Mr. Simms that he had three days from the date of the sanitary notice to correct the conditions noted. On December 6, 1988, the Department of Agriculture sent Mr. Simms a letter which enclosed the laboratory report concerning the sample taken by Mr. O'Neil during the November 28 inspection. The laboratory report revealed that the sample contained insects which were found to be Indian meal moths.

13. On December 13, 1988, Daniel O'Neil conducted a reinspection of the Sunrise Park Bakery to verify compliance of the orders issued on November 28, 1988. Mr. O'Neil's report states that the previous orders issued had been complied with. In addition, Mr. O'Neil wrote in the report that Grover Simms was informed that an inspection would be conducted some time in the month of January 1989, to verify that his establishment was being maintained in a clean and sanitary condition.

14. Flour purchased for baking and human consumption contains insect eggs which, with the proper temperature and humidity, will hatch and result in insect infestation. Although not a regular occurrence, the problem of hatching insects can occur in any commercial bakery.

15. On September 7, 1989, a complaint was received by the Department of Agriculture from a consumer alleging that live worms were found "in and around" english toffee cookies at the Sunrise Park Bakery. This complaint was referred to Daniel O'Neil. On September 8, 1989, Mr. O'Neil conducted an inspection of Sunrise Park Bakery as a result of the consumer complaint. At that time, Mr. O'Neil noted that all cookies at the bakery were inspected along with the english toffee type and no worms or evidence of worms were found. Mr. O'Neil took samples of the english toffee cookies for laboratory analysis. On September 28, 1989, Grover Simms was informed, by letter, that the Minnesota Department of Agriculture Laboratory found no insects or larvae in the english toffee cookies.

16. On May 2, 1990, the Department of Agriculture received a complaint from a consumer which alleged that mold was found on a loaf of bread purchased

from the Sunrise Park Bakery. This complaint was referred to Daniel O'Neil who conducted an inspection of the bakery on May 7. At that time, Mr. O'Neil did not find mold on any of the bread he examined. Senior Food Inspector James Roettger accompanied Mr. O'Neil on this inspection. As a result of the inspection, Mr. O'Neil issued 16 sanitation orders based on conditions he observed at the bakery, Pictures of the premises were taken by the inspectors which show: refuse and trash in the loading dock area, front sidewalk, and outside of the building on two sides; products which were unlabeled or mislabeled; mold on cheese in the deli service cooler; meat stored in towels in the deli cooler; an unfinished wall behind the deli service cooler and in the retail area; cake carton and bakery packaging in improper storage areas; no ceiling tiles in the bakery processing area and an opening in the roof@ a filthy and cluttered product scaling table and doughnut processing table; improperly stored products in the bakery processing area; uncleanly conditions in the deep fryer, bread rack and large proof box; rusty racks in the storage coolers raw products improperly stored in the bakery storage areas; filthy conditions in the restroom; and infants being cared for in the bakery processing area. On May 8, 1990, the Assistant Director of the Food



Inspection Division sent a certified letter to Grover Simms informing him that he should take prompt action to correct the conditions noted in the sanitation notice issued on May 7

17. On May 11, 1990, Daniel O'Neil and James Roettger returned to the Sunrise Park Bakery to conduct a reinspection of the establishment. Mr. O'Neil noted in his report that only five of 16 orders had been complied with but that Mr. Simms informed him that he planned to make extensive changes in the bakery processing area in order to comply with some of the conditions found- Pictures taken on May 11 show many of the same unclean and cluttered conditions noted on May 7.

18, On May 18, 1990, the Director of the Food Inspection Division sent a certified letter to Grover Simms informing him that his failure to maintain the bakery in a proper sanitary condition constituted a violation of Minn. Stat. 31.161 and 31.165. The Director (Thomas Masso) further informed Mr. Simms that the Department was contemplating initiating court action for the violations noted. Mr. Simms was offered an opportunity to meet with the Department on May 31, 1990 to discuss conditions at the bakery and resolution of the problems. This meeting was later rescheduled for June 4, 1990,

19. On June 4, 1990, Grover Simms met with several members of the Department of Agriculture staff, including Department Counsel William Oemichen, concerning the noncompliance with the sanitary orders issued on May 7, 1990. Mr. Simms did not have an attorney with him at this time. Each of the orders issued and Mr Simms' progress on compliance was discussed The Department allowed Mr. Simms until June 14, 1990 to complete the work necessary to comply with ten of the orders. However, before the meeting was over, Mr. Simms became upset, stating that "I've had enough of this shit," and left. Subsequently, on June 6, 1990, the Director of the Food Inspection Division hand-delivered a letter to Mr. Simms informing him of the compliance measures necessary to avoid legal action which could include a temporary restraining order, a preliminary injunction, or suspension or revocation of his license. Mr, Masso recommended that Mr. Simms consider retaining legal counsel to represent him.

20. On June 8, 1990, Daniel O'Neil contacted Grover Simms by telephone to inform him that a reinspection of his bakery would occur on Monday, June 11, 1990.

21. On June 11, 1990, Daniel O'Neil and James Roettger conducted a

reinspection of the Sunrise Park Bakery to verify compliance with the sanitary orders pending. At this time, they observed that the sanitary conditions at the bakery were not very much improved from what they had observed on May 7.

The inspectors took samples of the following items which seemed to indicate continued insect and rodent infestation: (1) insect webbing between an oven and an ingredient storage area; (2) rodent droppings from the same area; (3) insects from beneath papers on the product scaling table; (4) insects from the top of the ingredient storage table; (5) a rodent (mouse) found in a refrigeration unit; (6) rodent droppings from a back room storage area; and (7) a partial bag of product mix which was infested with insects.

Pictures taken of the bakery production area on that date show: (1) trash and refuse in a small room next to the food processing area and outside in the dock area; (2) miscellaneous items stacked on top of and around the scaling table;

(3) storage of miscellaneous items and ingredients in the processing areas  
(4) "used" infant panties on an ingredient scoop on a processing tables  
(5) personal food preparation items and dishes stored in the food processing area; (6) water leaking from a pipe in the ceiling; (7) rodent droppings on stored bags of ingredients and (8) a filthy men's restroom. Mr. O'Neil wrote sanitary orders which required immediate compliance by Grover Simms, Laboratory results of the samples taken by the inspectors on June 13 confirmed that there was both rodent and insect infestation throughout the bakery.

22. As a result of the conditions found during the June 11, 1990 inspection, the Department sought injunctive relief in Washington County District Court to close the bakery. On June 13, 1990, an Order was issued by the District Court prohibiting Grover Simms from operating the Sunrise Park Bakery until all sanitation standards had been complied with and until further Order of the Court. However, on June 15, 1990, Grover Simms and the Sunrise Park Bakery sold bakery goods to a restaurant in North St. Paul, Minnesota. Subsequently, on June 26, 1990, Washington County District Court found Grover Simms in contempt for violating the restraining Order issued on July 13. The Court sentenced Mr. Simms to serve 30 days in the Washington County Jail but 28 days of the sentence were suspended on the condition that Mr. Simms fully comply with the Court's Orders until such time as they are vacated. As part of the June 26, 1990 Order, the Court again prohibited Mr. Simms from operating the bakery until all applicable sanitation and equipment standards were complied with and a hearing was scheduled on July 17 to determine compliance with the Court's Orders. In addition, the Department's Motion for reimbursement of attorney's fees was to be considered on July 17.

23. On July 13, 1990, Department Inspectors Daniel O'Neil and Terry Scheiber conducted a reinspection of the Sunrise Park Bakery at the request of Grover Simms who, at that time, felt that the bakery was in compliance with all sanitation standards. However, the inspection revealed that many conditions noted in May and June of 1990 had still not been corrected. The inspectors took pictures of the premises which show: (1) debris in the loading dock area; (2) brush, debris and a rock pile at the rear of the premises which would constitute harborage for insects and rodents; (3) missing ceiling tiles in the ceiling above the oven and processing room; (4) personal items including food and beverage utensils in the processing room; (5) dirty personal eating utensils and dishes in the processing area; (6) an old oven and oven parts in the processing area which would constitute a harborage area; (7) ingredients on the floor in the processing area; and (8) uneven, rough walls in the women's and men's restrooms which were not easily cleanable. At the end of the inspection, the inspectors wrote orders covering 16 separate items which needed to be corrected. These orders were discussed with Grover

Simms and a copy was left with him. On July 17, 1990, the Department presented further evidence in a District Court hearing showing that Grover Simms had continued to violate the previous Court Orders prohibiting him from

operating the Sunrise Park Bakery. Because Mr, Simms denied those allegations, an evidentiary hearing was scheduled for July 23, 1990 to assess

Mr. Simms' compliance with previous Court Orders. The Department's Motion for

the reimbursement of attorney's fees was also deferred until that date, In addition, the Court stated in an Order issued July 20, 1990 that all previous

orders would remain in full force and effect concerning the prohibition against operation of the bakery. The evidentiary hearing scheduled for July 23 was later rescheduled for July 27, 1990.

24. On July 26, 1990, Department Inspectors Terry Scheiber and Daniel O'Neil, along with Supervisor Charles Klammer, conducted a reinspection of the Sunrise Park Bakery in response to a request from Grover Simms. At that time, the inspectors found that only two of the orders issued on July 13 had not been complied with. the inspectors' report noted that there was a large oven not in use and parts to that oven located in the food production area that constituted a harborage for both rodents and insects. In addition, there was a three-door refrigeration unit that was also not operational. The inspectors further noted that the bakery had complied with the sanitary notice issued on May 7, 1990. Pictures taken of the bakery at this time showed that a significant amount of cleaning and structural work had been done to remedy many of the unsanitary conditions which had been previously found by the inspectors.

25. On July 27, 1990, the Washington County District Court conducted a hearing on a second allegation that Mr, Simms was in contempt of the prior Court Order and to determine whether the bakery should be allowed to reopen. The decision on reimbursement of attorney's fees was continued until affidavits could be filed by both parties. At that time, Mr, Simms was found to have again violated the previous Court Orders and was sentenced to an additional 15 days in the county jail.

26. On or about July 27, 1990, the Department had informed Mr. Simms that it would not renew his retail foodhandler's license. However, the Department did agree that if Grover Simms sold his bakery to his children and turned over the control of the bakery to them, a license would be reissued in the children's name and the bakery could be reopened after all sanitary requirements were complied with. In the Court's Order dated July 30, 1990, Judge Maas ordered that the bakery would be allowed to reopen after Grover Simms had turned over the control of the bakery to his children and all remaining sanitary violations were corrected.

27. On July 27, 1990, Grover Simms sold all of his interest in the Sunrise Park Bakery to his children, Theresa, Thomas and Timothy. As part of the license application submitted by the three Simms' children, it was agreed in writing that they would place the inoperational oven and refrigerator in full operational condition within 30 days or remove those items from the bakery premises.

28. Because of animosity which had developed between Daniel O'Neil and Grover Simms, Mr. O'Neil requested that he be relieved of the responsibility of inspecting the Sunrise Park Bakery. Even though the operation of the bakery had been turned over to Grover Simms' children, Thomas Simms informed Mr. O'Neil that Grover was still going to work there and would still be in

charge. The Sunrise Park Bakery was allowed to reopen on or about August 1, 1990.

29. On September 11, 1990, Daniel O'Neil and Terry Scheiber conducted an inspection of the Sunrise Park Bakery after a consumer complaint had been received that cockroaches were seen near the "frosting" table, that children were allowed in the food processing area, and other unsanitary conditions were observed. The inspectors did not find any cockroaches in the bakery area and two children were found in the office area of the establishment. Theresa

Simms stated to the inspectors that the children were not allowed in the food processing area. The inspectors determined that the general sanitation conditions were acceptable with three minor exceptions which were noted in orders issued. In addition, the large oven that was to be refurbished and made operational was still not working but Tim Simms stated that it would be completed within two weeks

30. In an Order issued on September 24, 1990 by Washington County District Judge Kenneth Maas, it was determined that Grover Simms must reimburse the Department for its costs of litigation in the amount of \$2,500, The Department had claimed expenses in the amount of approximately \$13,000.

31. Even though Grover Simms had sold his interest in the bakery to Theresa, Thomas and Tim, he still retained operational control and made all decisions regarding financial matters. The Sunrise Park Bakery bank account was in Grover Simms' name and only he had authority to write checks out of that account. Both Tom and Tim Simms informed Inspectors Daniel O'Neil and James Roettger that although they were the licensees, Grover Simms still was "the boss" and ran the bakery operations.

32. On December 13, 1990, Department Inspectors James Roettger and Daniel O'Neil conducted an inspection of the Sunrise Park Bakery as part of the routine inspection process. On that date, the inspectors found evidence of insect infestation in several of the raw ingredients in the processing area. Four samples were taken for analysis by the Department laboratory. In addition, a sanitary notice was issued which required correction of the conditions found within three days. This notice required: the elimination of all insects and evidence of their infestation; the elimination of all trash from the bakery; and cleaning several pieces of equipment and rooms which were in an unsanitary condition. Photographs taken on December 13 showed insect webbing and the presence of insects in and around stored raw ingredients, In addition, the processing area was cluttered with miscellaneous items, personal food product and dishes were located in the processing area, and the hand sink in the processing room was very dirty.

33. On December 17, 1990, Mr. Roettger and Mr. O'Neil conducted a reinspection of the Sunrise Park Bakery. At that time, they found that all of the sanitation orders issued on December 13 had been complied with. The inspectors found that "general sanitation was satisfactory". However, the oven and refrigerator restoration projects were still not completed as had been agreed to by the licensees on July 27, 1990. In addition, several facility orders, which included providing hot and cold running water in the sink in the restroom, had not as yet been complied with.

34. On January 7, 1991, James Roettger conducted a reinspection of the

Sunrise Park Bakery. Daniel O'Neil was no long responsible for the inspection of that facility. On that date, five facility orders were issued which included a directive to provide both hot and cold running water in the sink in the restroom and to place the old oven and refrigerator in a full operational condition.

35. On January 23, 1991, Mr. Roettger conducted another inspection of the Sunrise Park Bakery at which time he found that the oven and the three-door refrigerator had still not been placed in a full operational



condition      This was a fourth notice on this order,      In addition,      the  
sinks      in  
the restrooms still did not have hot running water.

36.      On February 26, 1991, the licensees' counsel, Bruce L. Beck, taxed Thomas Masso a letter which stated that "Sunrise Bakery has agreed to complete the installation of the oven by 5:00 p.m., March 15, 1991 or else close until the oven has been properly installed,"

37.      On March 19, 1991, James Roettger conducted a reinspection of the Sunrise Park Bakery to determine whether previous orders issued had been complied with. On that date, Mr. Roettger observed that the non-operational oven had been assembled but it was still not in a usable condition. Tim Simms stated at that time that permits still had to be obtained from the City of Mahtomedi to complete the work- Mr, Roettger wrote an order requiring the licensees to clean both of the restrooms because they were excessively dirty. The inspector noted that hot and cold water were available at all of the hand sinks. At that time, the bakery was open for business despite the fact that the oven was not fully operational as had been promised by licensees' counsel in the letter dated February 26, 1991.

38.      On April 22, 1991, James Roettger conducted a reinspection of the Sunrise Park Bakery along with Jack Gill, building inspector for the City of Mahtomedi. On that date, the old oven was still not operational although several things had been done since the last inspection toward making it functional- On that date, both Tim and Grover Simms spoke to the inspectors in a belligerent manner which resulted in the inspection being terminated. The bakery was open for business on that date,

39.      Subsequent to the April 22, 1991 inspection, the Department filed a Motion for a temporary restraining order and temporary injunction with Washington County District Court requesting that the licensees immediately cease operations at the Sunrise Park Bakery. In an order dated May 8, 1991, Judge Howard R. Albertson ordered that the licensees were temporarily restrained and enjoined from operating the Sunrise Park Bakery until such time as all orders of the Minnesota Department of Agriculture had been fully complied with; and such time as the licensees had provided sufficient assurances to the Department which would allow the inspectors to conduct inspections without impediment or interference.

40.      On May 17, 1991, an evidentiary hearing was held on the Department's Motion before Judge Albertson in Washington County. At that time, Judge Albertson continued the temporary restraining order which had been previously

issued until such time as the Department filed an affidavit with the Court stating that all corrective orders had been complied with. The licensees were directed to contact the Department and Mahtomedi Inspector Jack Gill when they felt the bakery was in compliance with all applicable statutes, rules, ordinances and codes. Judge Albertson stated in his order issued May 20, 1991 that the temporary restraining order would be dissolved after submission of an affidavit by the Department and the City of Mahtomedi that all applicable standards were complied with, In addition, Judge Albertson ordered that the licensees may not in any way interfere with inspections of the Department or City of Mahtomedi at any time in the future.

41. on May 21, 1991, Terry Scheiber and James Roettger conducted an inspection of the Sunrise Park Bakery. At that time, the inspectors found that bakery products were being made by the licensees and pictures were taken showing bakery products being produced for sale. Grover Simms attempted to impede the inspection by preventing pictures from being taken by the inspectors. However, Tim Simms interceded and told the inspectors that they could complete their inspection. An order was issued by the inspectors at the conclusion of the hearing requiring that the licensees discontinue operation of the bakery in compliance with the Court Order. The inspectors noted that both electric and gas service had been provided to the previously non-operational oven.

42. On May 22, 1991, the Department and the licensees again appeared before Judge Albertson with respect to an Order to Show Cause concerning a violation of the previous Court Order. At that time, all three licensees were found to be in contempt for operating the bakery and Grover Simms was found to be in contempt due to his interference with the inspection conducted on May 21, 1991, Judge Albertson specifically ordered that the licensees "shall not operate their bakery nor otherwise produce, sell, give away or otherwise dispose of any bakery products until they comply with all conditions set forth in this Court's previous Orders and the Court's temporary restraining order has been vacated," This Order was dated May 24, 1991,

43, On May 31, 1991, Judge Albertson vacated the finding of contempt with respect to Theresa Simms. Judge Albertson sentenced Thomas, Timothy and Grover Simms to serve terms of 30 days in the Washington County Jail, however, the sentences were stayed to allow the Simms to purge themselves of their contempt by complying with all previous orders of the Court, paying attorneys' fees, and paying a fine of \$500 on or before August 15, 1991. The Simms were ordered to pay attorneys' fees in the amount of \$2,000 to the Office of the Minnesota Attorney General and \$1,000 to the Mahtomedi City Attorney on or before July 15, 1991.

44. On June 3, 1991, Terry Scheiber conducted an inspection of the Sunrise Park Bakery to verify that the refurbished oven had been placed in an operable condition in accordance with all applicable codes and regulations. The Mahtomedi building inspector, Jack Gill, was present during this inspection. At that time, the inspectors found that the oven was operational and in compliance with all applicable codes. Subsequently, an affidavit was filed with Washington County District Court and the temporary restraining order was vacated by Judge Albertson on June 6, 1991 allowing the licensees to

recommence operations as a bakery.

45. The licensees were informed by the Department that an inspection would occur sometime in June of 1991 prior to the expiration of their foodhandlers' license on June 30, 1991 to determine whether the license should be renewed.

46, On June 17, 1991, Department inspectors James Roettger and Terry Scheiber conducted a routine inspection of the Sunrise Park Bakery. At the conclusion of the inspection, a sanitary notice was issued as a result of insect infestation in various food products, unsanitary equipment and the lack of hot water in the restrooms. Pictures taken during this inspection show:  
(1) a layer of flour dust covering the raw ingredient packages and baking

equipment: (2) raw ingredient packages left open when not in use; (3) a cluttered scaling/processing table upon which live insects were found; and (4) a dirty sink in the processing area. Samples of raw ingredients and insects were obtained by the inspectors. The sanitary notice issued stated that all orders had to be complied with within three days. The laboratory report showed that raw ingredients at the bakery contained live adult merchant beetles and live adult Indian meal moths. The insects taken from the surface of the scaling/processing table were found to be live adult confused flour beetles.

47. On June 20, 1991, Terry Schieber and James Roettger returned to the Sunrise Park Bakery to conduct a reinspection to determine whether the licensees had complied with the orders issued on June 17, 1991. The inspectors found that all items listed in the sanitary notice had been corrected except the elimination of insects and evidence of insect infestation. The inspectors took more samples of insect infested raw ingredients (biscuit mix, sponge cake mix, and pudding cake mix) for laboratory analysis. The laboratory report showed that live adult merchant beetles were found in at least three of the raw ingredients. In addition, the inspectors purchased a sample of cookies from the bakery in which the laboratory found one adult merchant beetle.

48. Subsequent to the June 20, 1991 reinspection, the Department decided to not renew the licensees' foodhandlers' license. This decision was communicated to the licensees by a certified letter dated June 25, 1991 from Thomas W. Masso, director of the food inspection division. The licensees subsequently requested that a chapter 14 hearing be held at which time they could appeal the nonrenewal of their license.

49. The Sunrise Park Bakery is a small, family-run operation which has been in business for over 40 years. It has been the sole means of support for three Simms families. Subsequent to the nonrenewal of their license, the licensees have made significant improvements to the bakery, both in the retail area and in the food processing area. In addition, all outside areas and the dock/loading area has been cleared of all harborages and debris. The Sunrise Park Bakery has remained closed since June 30, 1991. The licensees are awaiting the resolution of their licensure status.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Agriculture have jurisdiction over this matter pursuant to Minn. Stat. 14.50 and 28A.07

(1990). The Department has complied with all procedural and substantive requirements of statute and rule. The Notice of Hearing was, in all respects, proper as to form and content.

2. Pursuant to Minn. Stat. 28A.07, the Commissioner of Agriculture

". . . may cause appropriate inspections to be made to determine under applicable statutory and promulgated rule requirements, the applicant's fitness to engage in the mode(s) of business described in that person's license application." Additionally, the Commissioner ". . . may withhold authorization to engage in any aspects of business for which the applicant is

not deemed fit under this section." Based upon the licensees' history of recurring sanitary problems at the Sunrise Park Bakery, including insect infestation, and noncompliance with orders issued by the Department of Agriculture and Washington County District Court, the Judge concludes that the Department has shown "unfitness" within the meaning of Minn Stat, 28A.07

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

If IS RESPECTFULLY RECOMMENDED that the Commissioner of Agriculture take appropriate disciplinary action against the retail foodhandlers license issued to Thomas Simms, Timothy Simms and Theresa Simms, d/b/a Sunrise Park Bakery.

Dated this            day of September, 1991

PETER C. ERICKSON  
Administrative Law Judge

#### NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. No transcript prepared.

#### MEMORANDUM

The record in this matter is clear that although Grover Simms sold all his interest in the Sunrise Park Bakery to his children, who subsequently obtained the required retail foodhandlers license, the bakery has been operated under his control through the end of June 1991. The record shows that sanitation problems noted by inspectors, even if corrected, continued to reappear in later inspections, The licensees have shown a disregard for sanitation requirements and district court orders which prohibited the bakery from operating. Although the Judge could not find any rules, statutes or cases which set forth standards for "fitness" to be a retail foodhandler, the record herein shows that, despite many "second chances", the licensees are not presently "fit" to retain their license,

The Judge is not persuaded that the licensees can never again be licensed to operate the Sunrise Park Bakery. However, along with structural and cleanliness improvements, many of which have already been made, the business

operations will have to be restructured so that the licensees do have actual control on a day-to-day basis

P. C.E,

.12.